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No. 05-1493

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IN THE

Supreme Court of the United States

AT&T INC., fka SBC COMMUNICATIONS INC.,

Petitioner,

v.

RLH INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION

H. KENNETH KUDON
KUDON LAW FIRM
Two Old Creek Court
Potomac, MD 20854
(301) 279-5634

JAMES A. STEARMAN
Counsel of Record
RICHARD S. PRICE, II
1235 N. Harbor Blvd.
Suite 200
Fullerton, CA 92832
(714) 871-1132

Counsel for Respondent

201899

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction to review the interlocutory decision of the California Court of Appeal in this case.

2. Whether application of California's Competition statutes to out-of-state anticompetitive conduct that substantially affects California commerce is either beyond the reach of the Commerce Clause or subject to the *Pike* balancing analysis.

RULE 29.6 STATEMENT

Respondent RLH Industries, Inc., a California corporation, does not have a parent company and no other public company owns 10% or more of its stock.

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JURISDICTION

This Court lacks jurisdiction to review the interlocutory order of the California Court of Appeal in this case. The California Court of Appeal rendered an "interim" decision; not a final judgment. After the Supreme Court of California denied review, the case was remanded to the trial court. Trial is set for January 8, 2007.

Under 28 U.S.C. § 1257(a), this Court's review of state court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." To warrant review by this Court, a case must be subject to no further review or correction in any other state tribunal and must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

The decision of the court below was not an effective determination of the litigation. First, petitioner AT&T Inc. ("AT&T") may yet establish that the Commerce Clause bars the antitrust and unfair competition claims of respondent RLH Industries, Inc. ("RLH"); and this showing may, indeed, be bound together with RLH's proofs of the effects of AT&T's conduct in California. Secondly, AT&T undoubtedly will raise other federal issues including due process of law. Third, not all of RLH's claims involve federal issues. Fourth, the trial court's decision will be subject to further review by the California appellate courts and also by this Court.

Moreover, the decision below does not fall within any of the four categories of exceptional cases in which the Court has treated state-court judgments as final even though further

proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975). The first three *Cox* categories are plainly inapplicable. The fourth *Cox* category, too, is inapplicable. Delaying review of the decision below cannot "seriously erode . . . Constitutional policy" as no immediate and systemic consequences will result from such a delay.

COUNTERSTATEMENT OF THE CASE

RLH, a California company, is one of only four manufacturers of high voltage protection ("HVP") devices used to prevent life and property threatening electrical surges. P.A. 4.[1] The California Court of Appeal, reversing summary judgment in favor of AT&T, determined that "triable issues abound" on whether AT&T's policy of forbidding its customers from buying or installing their own high voltage protection ("HVP") devices from RLH or anyone else, in AT&T's five state Midwestern territory where it dominates local telephone service, is a tying arrangement. P.A. 19a-20a. The court below also found evidence tending to show that this conduct injured RLH ("Cynergy Corporation would prefer to use RLH devices in its new facilities, but instead leases [AT&T] HVP services due to its HVP policy"). P.A. 20a. In recent years, RLH lost thousands of dollars in sales to AT&T at Cynergy alone. Appellant's Opening Brief, pg. 36.

AT&T, until recently known as SBC Communications Corp., conceded personal jurisdiction in California.[2] P.A. 18a.

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1. The Appendix to the Petition for Certiorari is cited as "P.A. [*page*]."

2. SBC asserts that the court erroneously found personal jurisdiction over it. But the record clearly shows that SBC not only

(Cont'd)

RLH brought its second amended complaint against AT&T in California state court consisting of four causes of action, the first and second for unlawful tying arrangements in violation of California's Cartwright Antitrust Act, *Cal. Bus. & Prof. Code*, §§ 16720, 16726 *et seq.*, the third under California's Unfair Competition Act, *Cal. Bus. & Prof. Code*, §§ 17200 *et seq.*, and the fourth for common law intentional interference with prospective advantage. The third and fourth causes of action are based primarily, but not entirely, on the tying arrangements. P.A. 25a-42a. Although AT&T glosses over it [Cert. Pet., pp. 4, 11, 21], only the unfair competition cause of action seeks affirmative injunctive relief. P.A. 38a, 40a (Prayer for Relief).

AT&T incorrectly asserts that RLH's second amended complaint did not allege claims against AT&T's out-of-state subsidiaries based on RLH's efforts to sell its products in California. Cert. Pet., pg. 4. This statement creates the misconception that RLH does not manufacture and sell its HVP devices in California. To the contrary, as AT&T acknowledges, RLH has its headquarters and principal place of business in California; it manufactures and sells its HVP devices there. P.A. 26a, ¶ 4. So, RLH's claims are, in fact, based on its efforts to sell HVP devices in California.

(Cont'd)

conceded the Court's personal jurisdiction over SBC but also the Court's power to award damages or injunctive relief as to extraterritorial conduct that impacts California, as follows: "[w]e don't dispute at all that we are properly here and that this court has the power to issue an award . . . of damages or injunctive relief with respect to conduct that impacts the state of California" and, moments later, "[t]his is not about jurisdiction. We'll concede jurisdiction." Appellant's Reply Brief, p. 14 (*citing* August 26, 2003 Hearing Transcript, pp. 7:18-24, 13:22-24)

AT&T also claims that RLH's pleading does not allege that AT&T's out-of-state tying arrangements impacted the California market for HVP devices or California consumers of HVP devices. Cert. Pet., pg. 4. AT&T's statement again creates the misconception that AT&T's allegedly unlawful conduct is disconnected from California. AT&T not only fails to acknowledge that its conduct has caused injury to California commerce but also ignores RLH's allegation that California was the locus of part of the allegedly wrongful conduct. P.A. 32a, ¶ 24.

Further, AT&T asserts that every state in which it operates has its own regulatory body and tariffs and some of these tariffs embody the conduct comprising the alleged tying arrangements. Cert. Pet., pg. 5-6. AT&T, however, has overlooked relevant fact-intensive questions: whether these tariffs are proper subjects of regulation that are mandated by state law and closely supervised or are, as the evidence would suggest, unilaterally written and imposed by AT&T. Appellant's Reply Brief, pp. 24-25; P.A. 19a. These questions can only be answered through trial on the merits.

In response to a summary judgment motion in California, the nonmovant must demonstrate (i) that the movant failed to produce admissible evidence showing that an element of the cause of action cannot be established or (ii) if necessary, the existence of a triable issue of material fact as to the element at issue. *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 103 Cal. Rptr. 2d 672 (2001). Thus, while RLH produced sufficient evidence to defeat AT&T's summary judgment motion, RLH did not have to show, for example, the full extent of its injuries attributable to AT&T's allegedly anticompetitive conduct or the total effect of AT&T's out-of-state conduct upon California

commerce. Again, development of a complete factual record on this issue must await trial.[3]

The California Court of Appeal also denied summary judgment to AT&T on its contention that it was not liable for its subsidiaries' HVP policies, holding that "[w]hether AT&T is liable under either an agency or alter ego theory is a question of fact." As the court below found, this is a fact-laden question. P.A. 11a. It is inextricably intertwined with the merits of the case. Accordingly, determination of this issue, too, awaits trial.

Finally, in finding that AT&T "failed to meet its summary judgment burden" on the Commerce Clause defense (P.A. 18a),[4] the court below allowed AT&T the opportunity to establish in the trial court that the Commerce Clause, in fact, bars RLH's state antitrust and unfair competition claims. P.A. 19a. The court explained that whether the state law unduly burdens interstate commerce when all is taken into account requires an analysis which AT&T did not present on summary judgment: a "fact intensive" balancing of the "benefits of applying California law to [AT&T's] alleged tying arrangements against the burden condemning the tying arrangements under California law . . . would impose on interstate commerce (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))." P.A. 15a.

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3. At trial RLH expects to show the full extent of the harm to RLH's production, sales and earnings in California resulting from AT&T's alleged conduct and, beyond that, the "ripple" effects of AT&T's conduct upon, among other things, salaries and employment of California residents, purchases from California suppliers and the like.

4. The specific statutes which AT&T contends are barred by the Commerce Clause are the Cartwright Act and the Unfair Competition Act. Brief for Respondents, p. 30.

The California Court of Appeal found that AT&T not only came up short on its Commerce Clause analysis but also neglected to raise and, therefore, waived for summary judgment purposes other potentially relevant issues including legislative intent, due process of law and conflict of laws ("[t]he conflict of laws or due process issues may . . . require an in-depth analysis of the legal effect of the tariffs that AT&T has filed with various state agencies"). P.A. 18a-19a. Accordingly, the California Court of Appeal remanded the case for trial, "express[ing] no opinion on potentially relevant issues not yet litigated, including a rigorous *Pike* analysis." P.A. 19a. Reflecting the "interim" nature of the proceedings, the court granted the trial court discretion to award appeal costs to "the party ultimately prevailing." P.A. 21a.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review The Interlocutory Order of The California Court of Appeal.

Palpably, this Court lacks jurisdiction to review the interlocutory order of the California Court of Appeal in this case. This Court's review of state court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). From the face of the California Court of Appeal's decision, it is readily apparent that, in the court's own words, it is an "interim proceeding"; the court did not render a "final judgment." The court referred specifically to AT&T's failure to meet its summary judgment burden and "express[ed] no opinion on potentially relevant issues not yet litigated, including a rigorous *Pike* analysis."

There are indeed further proceedings yet to come in the case. The trier-of-fact has not heard RLH's antitrust and unfair competition claims or AT&T's state and federal defenses including that (i) AT&T is not liable for the acts of its local telephone subsidiaries (ii) the tying claims are barred by the Commerce Clause and (iii) the tying claims are barred by other Constitutional infirmities such as due process of law. Apart from that, the trier-of-fact has yet to hear RLH's tortious interference with prospective advantage claim which is unaffected by federal issues.[5] After the trial court renders judgment on all of RLH's claims, either party may appeal as of right to the California Court of Appeal. That court's decision is in turn subject to discretionary review by the Supreme Court of California and by this Court.

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (citation omitted). To warrant review by this Court, a case must be final in two senses: "'it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* (citation omitted).

The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920). The decision below plainly does not meet this standard. To begin with,

5. AT&T did not argue whether RLH's intentional interference cause of action is barred by the Commerce Clause. Therefore, the Court of Appeal did not address this question.

the court below ruled that AT&T may yet establish that the Commerce Clause bars RLH's antitrust and unfair competition claims as a matter of fact. This showing may, indeed, be bound together with RLH's proofs on the merits, *i.e.* substantial impact upon California commerce.

Secondly, AT&T undoubtedly will raise due process of law and other federal issues. Third, some but not all of RLH's claims involve federal issues. RLH's tortious interference claim remains unaffected. Finally, the trial court's decision is subject to review by the California appellate courts. Even assuming the Court of Appeal adheres to its interim Commerce Clause ruling as "law of the case," that decision will not bind the California Supreme Court, should it grant discretionary review. And, the decision surely will not be binding upon this Court.

Nor does the decision below fall within any of the four categories of cases in which the Court has treated state-court judgments as final even though further proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485.[6] The first three *Cox* categories are

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6. *Cox* holds that the finality requirement may be satisfied despite the pendency of further proceedings when (1) "there are further proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue * * * will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings

(Cont'd)

plainly inapplicable. The federal issue is not conclusive or preordained. Indeed, the California Court of Appeal identified potential Constitutional issues, *e.g.* due process, that AT&T has not yet raised. *See Cox*, 420 U.S. at 477 (exceptional situations typically "would not require the decision of other federal questions that might also require review by the Court at a later date").

The federal issues will not necessarily "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Should AT&T prevail on any of its state law defenses, the federal issues could be mooted. *Jefferson*, 522 U.S. at 82. On the other hand, if AT&T does not prevail, it may appeal all issues as of right to the California Court of Appeal followed by discretionary review in the California Supreme Court. Thus, the California courts' ultimate "determination will in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 82-83.

The fourth *Cox* category involves cases in which

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.

This category is also inapplicable.

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pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 479-483.

Although AT&T could arguably prevail on the merits on nonfederal grounds *and* prevail on federal grounds on the antitrust and unfair competition claims if this Court reversed the lower court's Commerce Clause ruling, the fourth *Cox* exception is only available when delaying review would "seriously erode . . . Constitutional policy." *Cox*, 420 U.S. at 483. In the Constitutional realm, the fourth *Cox* exception has been limited, as a rule, to First Amendment cases, *id.* at 484-85 (citing cases), and, as a rare exception, to other Constitutional issues in which the impact of delaying review has immediate and potentially systemic consequences. *E.g. Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Delaying review would not seriously erode Constitutional policy in the circumstances of this case. The question raised by AT&T does not raise First Amendment questions. Nor does it have imminent and potentially systemic consequences. It is, therefore, comparable to such cases as *Flynt v. Ohio*, 451 U.S. 619, 622-23 (1981) (resolution of equal protection clause issue could await final judgment without "adverse effect upon important Federal interests; a contrary conclusion would permit the fourth exception to swallow the rule") and *Johnson v. California*, 541 U.S. 428, 430 (2004) ("no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's [Constitutional] claim").

Accordingly, the Court lacks jurisdiction to review the interlocutory decision of the California Court of Appeal in this case.

II. There is Not a Genuine Conflict in The Lower Courts on Whether Direct Regulation of Extraterritorial Commerce is Unconstitutional Without Further Inquiry

AT&T argues that the Court should grant certiorari because there is a division in the Circuits on whether direct regulation of extraterritorial commerce is unconstitutional without further inquiry. Cert. Pet., pg. 16. No genuine conflict exists. It is simply the case that no court has adopted AT&T's view that "regardless of the beneficial effects a statute has on local activity it should be declared invalid if it has any extraterritorial effects." *See Alliant Energy Corp. v. Bie*, 336 F.3d 545, 547 (7th Cir. 2003) (rejecting such an argument in denying petition for rehearing *en banc*). Rather, lower courts have applied this Court's precedents requiring courts to strike down "a state law shown to have extraterritorial scope and an *adverse impact* on commerce occurring wholly outside the state." *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) (emphasis added).

A. The Critical Inquiry in Commerce Clause Jurisprudence is Always The Same; The Scope and Depth of The Inquiry Vary Depending Upon The Nature of The Statute and The Facts of The Case.

In all cases addressing Commerce Clause questions, the critical inquiry remains the same: "[T]he overall effect of the statute on both local and interstate commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 337 n.14 (1989) (*citing Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)).[7] The scope and depth of the inquiry needed

7. The *Healy* Court also noted that its "distillation of principles from prior cases involving extraterritoriality [including the principle upon which AT&T relies] is meant as nothing more than a restatement of those specific concerns that have shaped *this* inquiry." *Healy v. Beer Inst.*, 491 U.S. at 337 n.14 (emphasis added).

to determine whether a state law unduly burdens interstate commerce and, therefore, transgresses the Commerce Clause vary depending upon the nature of the statute at issue and the facts of the particular case. AT&T's review of the lower court cases overlooks this important point. As a consequence, AT&T sees division and confusion that on closer scrutiny does not necessarily exist.

In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), as one example, the court reviewed a Vermont criminal statute intended to protect minors living in Vermont from internet obscenity. The court observed that the internet is a unique phenomenon that does not recognize geographic boundaries. *Id.* at 103. As a result, website operators operating lawfully in State A were subject to criminal penalties in Vermont. *Id.* While acknowledging Vermont's interest in protecting minors against such out-of-state websites (*id.* at 104), the court nevertheless found an undue burden on out-of-state commerce resulting from inconsistent state legislation in this sphere. *Id.* (*citing e.g. American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997)).

Accordingly, in striking down state internet legislation, lower courts have relied upon analysis of its practical effects and found adverse impact upon interstate commerce. *Accord*: *Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (adopting *Pataki* analysis regarding "haphazard, uncoordinated, and even out-right inconsistent regulation by states") and *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (also relying upon the *Pataki* analysis).

Similarly, in *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the court analyzed a Nevada statute providing certain due

process protections during enforcement proceedings that the NCAA, the national intercollegiate athletic regulatory organization, did not provide. The statute was apparently aimed exclusively at the NCAA, whose goal is to create a uniform nationwide collegiate athletic "product" through enforcement procedures applied uniformly and even-handedly nationwide. *Id.* at 638.

The court clearly found that Nevada's statute was per se invalid *because* it unduly burdened out-of-state commerce. Nevada's statute forced the NCAA either to adopt non-uniform standards which could lead to college athletic non-uniformity or, alternatively, to compromise the integrity of its product in every state by adopting Nevada's procedures nationwide. *Id.* at 639. Beyond that, other states also had enacted or were about to enact their own due process statutes, creating "the serious risk of inconsistent obligations . . ." *Id.* at 640.

In *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652 (7th Cir. 1995), the court analyzed a Wisconsin statute that prohibited waste generators from using Wisconsin landfills unless they generated waste in a community that adopted the law's "effective recycling program." The court struck down the statute after finding an adverse impact on out-of-state commerce. The law worked a practical "embargo" on out-of-state communities that refused to comply with the Wisconsin law and had the practical effect of inflicting a higher cost burden on some out-of-state competitors than on others wholly based on whether their communities adhered or refused to adhere to Wisconsin's statute. *Id.* at 660-61.

B. The First and Eighth Circuits' "First Tier" Commerce Clause Analysis Does Not Conflict With That of Other Circuits.

Although AT&T argues otherwise [Cert. Pet. Pg. 18], the First and Eighth Circuits have not rejected the view that direct regulation of interstate commerce is per se invalid. Rather, these courts, too, have looked beyond the mere extraterritorial effect of the statute and have analyzed whether in "practical effect" it unduly burdens interstate commerce and, therefore, violates the Commerce Clause.

C. The First Circuit's Application of Commerce Clause Precedents Recently Has Been Approved by The Court.

The First Circuit's decision in *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), illustrates the proper application of Tier One analysis more adequately than *Grant's Dairy-Maine LLC v. Commissioner of Maine Dept. of Agriculture*, 232 F.3d 8 (1st Cir. 2000), and also carries the advantage of this Court's review and imprimatur of its Commerce Clause analysis. *Walsh*, 538 U.S. at 669-70 ("Maine Act does not regulate the price of any out-of-state transaction" and the "Program will not impose a disparate burden on any competitors.")

In *Concannon*, the court reviewed a Maine statute intended to obtain lower prescription drug prices for Maine's citizens. The program subsidized drug prices by collecting rebate payments from participating drug manufacturers. The primary incentive for manufacturers to enter rebate agreements with the state was a rule that drugs of all

noncompliant manufacturers could lose their Medicaid authorization. *Concannon*, 249 F.3d at 71-72.

The court rejected an argument that the law constituted per se invalid extraterritorial regulation as it necessarily regulated drug manufacturer and distributor transactions outside the borders of Maine and reduced rmanufacturers' profits. *Id.* at 80, 82. Because Maine did not insist that manufacturers sell their drugs to a wholesaler for a certain price nor tie the price of its in-state products to out-of-state prices, it was not regulating their out-of-state conduct. *Id.* at 81-82. Rather, the Act simply regulated in-state activity. *Id.* at 82. Moreover, it did not appear that adverse effects on commerce would occur if similar legislation were enacted in other states. *Id.* at 82-83.

D. The Eighth Circuit's Approach to Commerce Clause Analysis is Not Out-of-Line With its Sister Circuits.

Finally, AT&T has cited *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), as evidence that the Eighth Circuit has rejected the principle that direct regulation of interstate commerce is *per se* invalid. The Eighth Circuit, however, has not rejected that principle. Instead, like her sister Circuits and this Court, the Eighth Circuit has analyzed whether the law has "extraterritorial scope and an adverse impact on commerce occurring wholly outside the state." *See Meyer, supra*, 63 F.3d 652, 659.

Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), applied this type of analysis to a Minnesota law prohibiting the sale of petroleum-based sweeping compounds. As a result of the law's passage, Minnesota wholesalers and distributors

refused to purchase or sell these petroleum-based sweeping compounds from the plaintiff who lost not only its Minnesota customers but also most of its sales in surrounding states. *Id.* at 793-94.

Mindful that a statute could have *per se* unconstitutional extraterritorial reach under this Court's precedents "when it necessarily requires out-of-state commerce to be conducted according to in-state terms," the court did not find that to be the case. Although the law "affected [the plaintiff's] participation in interstate commerce," it did not "necessarily affect out-of-state commerce" — the plaintiff was still "able to sell to out-of-state purchasers regardless of [its] relationship to Minnesota." *Id.* at 794. Therefore, the court ruled out per se invalidity and applied the balancing analysis approved in *Pike, supra,* 397 U.S. 137, 142. *Accord*: *Hampton Feedlot v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001) (determining that state statute was not per se invalid direct regulation of or discrimination against interstate commerce).

Cotto Waxo underscores that, though the scope and depth of the inquiry needed to determine whether a state law unduly burdens interstate commerce may vary depending upon the nature of the statute at issue and the facts of the particular case, there is no *genuine* conflict among the Circuits regarding proper application of the Court's Commerce Clause precedents.

III. The California Court of Appeal's Decision Correctly Applied This Court's Commerce Clause Precedents.

The California Court of Appeal's analysis of AT&T's Commerce Clause argument is incorporated herein by reference. PA 11a-19a. Contrary to the argument advanced by AT&T [Cert. Pet., p. 12], the court below correctly applied the first tier of this Court's two-tier Commerce Clause analysis[8], insofar as the summary judgment record would permit.

A. The California Court of Appeal Applied the First Tier Commerce Clause Analysis Insofar as The Record Permitted.

In determining whether a statute unreasonably burdens interstate commerce, the Court repeatedly has deemed it appropriate to consider how a statute such as California's Cartwright Act operates in the context of other states' laws. *E.g., Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (applying "internal consistency" test and inquiring

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8. The two-tier analysis reads as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. at 579.

whether "imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear").

The California Court of Appeal properly applied the "internal consistency" test and found no inconsistency.[9] Observing that *Healy's* "understanding of the commerce clause's purpose and scope may be consistent with giving extraterritorial effect to [state antitrust] laws," the court determined that projecting California's prohibition of tying arrangements into other states would not create internal inconsistency as "the Sherman Act already bars tying arrangements throughout the land." P.A. 14a.[10]

Implicit in the California Court of Appeal's Commerce Clause analysis is the recognition that, unlike the statutes in cases such as *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), where extraterritorial transactions were regulated in some instances for no reason while providing no protection for any legitimate state interest, application of the California statutes in this case never affects extraterritorial conduct

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9. The court below pointedly observed that AT&T "notes no inconsistency" between condemnation of the tying arrangements under California or federal law. P.A. 15a.

10. Additionally, practically every state has enacted "little Sherman" statutes which are generally governed or guided by federal antitrust precedents. This Court has recognized in connection with the settlement of a case brought by various states challenging an extraterritorial price fixing conspiracy under both state and federal antitrust laws that the former are not preempted by federal antitrust laws and, indeed, are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *See California v. ARC America Corp.* 490 U.S. 93, 101-102 (1989).

without providing corresponding protection for California's significant interests. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987). Thus, the California Court of Appeal reasoned — without finally deciding the issue — that California's antitrust and unfair competition statutes could reach out-of-state anticompetitive practices that *cause harm in California.*

B. The California Court's Understanding of Commerce Clause Jurisprudence Finds Support in Decisions From Other Jurisdictions That Have Applied State Antitrust Statutes to Out-of-State Anticompetitive Conduct.

The California Court of Appeal's understanding of the Court's Commerce Clause jurisprudence also finds support in decisions from other jurisdictions that have applied state antitrust statutes to out-of-state anticompetitive conduct causing in-state harm, and also in authoritative commentary. P.A. 16a-18a (*citing In re Lorazepam & Clorazepate Antitrust Litigation*, 295 F. Supp. 2d 30 (D.D.C. 2003); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-994 (9th Cir. 2000); and *Heath Consultants v. Precision Instruments*, 527 N.W.2d 596 (Neb. 1995); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 376(1983).[11]

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11. The Court's approach in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) also offers support. The Court found that the punitive damages award under Alabama's statute could violate *Healy*'s state sovereignty and comity principles only if (a) the conduct "had no impact on Alabama or its residents" or (b) Alabama's intent was to punish the defendant or to deter its lawful conduct in other states rather than to protect Alabama's own consumers and economy from harm.

Significantly, leading antitrust decisions from other jurisdictions disagree with AT&T's contention that application of a state's antitrust statute to out-of-state anticompetitive conduct is *per se* invalid direct regulation of interstate commerce. Cert. Pet., p. 11, *et seq.* These decisions regard the state's antitrust statute as having "incidental effects" on interstate commerce subject to the *Pike* balancing analysis[12] — an analysis the court below found appropriate for the present case but declined to undertake for AT&T. P.A. 16a-17a.[13]

C. AT&T's Contention That The Commerce Clause Bars All Claims Under State Statutes Based Upon Extraterritorial Conduct is Overly Simplistic and Unavailing.

AT&T persists in maintaining — somewhat awkwardly as will be shown in the next section — that the Commerce Clause bars all claims under state statutes based upon extraterritorial conduct (even when the conduct has in-state

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12. *Heath Consultants* and *Lorazepam Antitrust Litigation*, *supra*, cited by the court below, reached this conclusion. Other decisions that were not cited by the court also have determined that the state antitrust statute in question had "incidental effects" on interstate commerce and, therefore, employed or would employ the *Pike* balancing analysis in determining whether such statutes can be applied to out-of-state anticompetitive conduct harmful to state interests. *See, e.g., Freeman Industries, LLC v. Eastman Chem. Co.*, 172 S.W. 3d 512 (Tenn. 2005); *Olstad v. Microsoft Corp.*, 700 N.W. 2d 139 (2005); *C. Bennett Bldg. Supplies v. Jenn Air*, 759 S.W. 2d 883 (Mo. App. 1988); *State v. Coca Cola Bottling Co. of Southwest*, 697 S.W. 2d 677 (Tex. App. 1985).

13. The court noted that "[e]ven if we wanted to conduct a *Pike* balancing analysis for [AT&T], the record [AT&T] developed for summary judgment would not allow us to do so at this time." P.A. 16a n.5.

effects). Cert. Pet., pp. 12-13. AT&T's overly simplistic argument is flawed. This Court "has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border." *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) (*citing* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1878 (1987) ("prohibition [of all state laws that have substantial extraterritorial effects] would invalidate much too much legislation.")).

That AT&T's overly simplistic argument is at odds with this Court's Commerce Clause jurisprudence is also suggested by the recent denial of a writ of certiorari to Beretta, U.S.A., Corp. (joined by the Chamber of Commerce of the United States, among others, as *amici curiae*), whose argument to the Court was strikingly similar to that of AT&T.[14] *Beretta, U.S.A., Corp. v. District of Columbia*, __ U.S. __; 126 S. Ct. 399; 163 L. Ed. 2d 277 (2005).

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14. Beretta sought review of *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (en banc), which rejected a contention that the Commerce Clause, *inter alia*, barred application of a District of Columbia statute holding out-of-state weapons manufacturers strictly liable in tort for injuries arising from the discharge of certain weapons in the District of Columbia.

D. AT&T's Attempt to Draw a Commerce Clause Distinction Between In-State Impact on Consumers or Markets, on One Side, And Manufacturers And Vendors, on The Other, is a Distinction Without a Difference.

While, on the one hand, AT&T contends that the Commerce Clause bars all claims under state statutes based upon extraterritorial conduct (even when the conduct has in-state effects), on the other, the Petitioner strongly implies that a nexus between out-of-state anticompetitive conduct and in-state impact upon *consumers or markets* would withstand Commerce Clause scrutiny. As just one example, and there are others, AT&T states that "no benefits on the side of regulation can justify California in controlling [out-of-state] conduct . . . that does not impact California markets or consumers."[15] Cert. Pet., pp. 13, 23. While in-state competitive injury to consumers or markets would withstand such scrutiny, such injury to California *manufacturers or vendors* of goods; that is, RLH, would not.

AT&T has merely created a distinction without a difference in either law or economics. Commerce, by definition, is "the exchange of goods and services, esp. on a large scale involving transportation between cities, states and nations." *Black's Law Dictionary* (7th Ed. 1999). In seeking to limit its definition of commerce to consumers or markets, AT&T is perforce excluding manufacturers and vendors, one-half of the commerce equation. AT&T's "distinction" of

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15. AT&T effectively concedes this point in its Question Presented: "Whether a State's direct regulation of commercial [out-of-state] conduct . . . that has no effect on *consumers or markets* within that State is a per se violation . . ." (emphasis added).

convenience is out-of-touch not only with economic and business reality but also with the sound objectives of antitrust law.

Antitrust laws generally and California's Cartwright Act, in particular, outlaw combinations to "prevent competition in manufacturing . . . transportation . . . [or] sale . . . of merchandise." *See Cal. Bus. & Prof. Code* § 16720 (c). In Commerce Clause challenges to state antitrust law enforcement, courts have never recognized any distinction based on which side of the commerce equation the victim falls. *See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc., supra,* 232 F.3d at 993-994 (milk producers adversely affected by out-of-state conspiracy) and *Lorazepam Antitrust Litigation, supra.* (Illinois insurance company responsible for paying its out-of-state subscribers' price-fixed prescription drug costs).

AT&T's citation to *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as support for its strained distinction, is far off the mark. Indeed, the Court noted in *Matsushita* that the Sherman Act reaches conduct outside United States borders "when the conduct has an effect on American commerce." *Id.* at 582 n.6. The *Matsushita* language recited by AT&T simply pertains to conduct in Japan having no impact on American commerce. *Id.* at 583.[16] That language is manifestly inapposite to the present case. The court below found that RLH demonstrated sufficient injury attributable to AT&T's out-of-state tying arrangements to meet its summary judgment burden. P.A. 20a.

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16. In *Matsushita*, the Court found that, although a below-cost (predatory) pricing conspiracy by Japanese television producers could have injured the plaintiff manufacturers, they were unable to establish such a conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986).

If AT&T were to concede, as it should, that there is no legitimate distinction in this context between consumers, manufacturers and vendors, it would be left with the argument that the nexus between AT&T's out-of-state anticompetitive conduct and RLH's in-state injury could withstand Commerce Clause scrutiny under other circumstances but does not on the facts of this case because the commerce is *quantitatively* insufficient.

Such an argument, of course, presents a paradigm fact question that is entirely inappropriate for review on an incomplete summary judgment record. *See* n.3, *supra*. But wholly apart from it being a paradigm fact issue, it is not the proper analysis of substantiality in any event. *See Freeman Industries, LLC v. Eastman Chem. Co.*, 172 S.W. 3d 512, 523-24 (Tenn. 2005) (under federal antitrust precedents, whether effect is substantial does not involve "mathematical nicety"; "test is pragmatic, turning on facts . . ."; "anticompetitive conduct need not threaten demise of [state's] business").

E. AT&T's Tariff Argument Presents Fact Questions That Are Not Ripe For Review.

Finally, AT&T argues that RLH "seeks to use California law to make AT&T's subsidiaries change their filed tariffs" in other states. Cert. Pet., pg. 15. The California Court of Appeal refused to entertain this argument on its merits because AT&T "mentioned the tariff issue only in a footnote with a single citation to *Healy*, and thus failed to offer the comprehensive legal analysis needed to affirm summary judgment on this ground (citations omitted)." P.A. 19a. The court, however, added that this was one of the "potentially relevant issues" that could be litigated after the case was remanded to the trial court. P.A. 18a-19a.

AT&T's tariff argument is not yet ripe for review by this Court for the reasons stated by the court below, among others. First, RLH seeks affirmative injunctive relief *only* under the California Unfair Competition statute, not under the Cartwright Act. Secondly, injunctive relief has not been granted in this case so there has been no judgment requiring AT&T to modify its conduct and, therefore, no review of such relief by California's appellate court system. Most importantly, and finally, the factual record has not been sufficiently developed to determine whether the tariffs embodying the HVP tying arrangements at issue are immune from antitrust scrutiny. *See* P.A. 19a (*citing Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F. 2d 716, 733-37 (9th Cir. 1981)).

IV. This is The Wrong Case at The Wrong Time For Further Review and Application of Commerce Clause Principles.

The California Competition statutes reviewed in the court below apply only to anticompetitive conduct having substantial effects on California commerce. AT&T's speculation concerning other states following the lead of the California Court of Appeal in this case, risks of inconsistent legislation, and interstate economic battles, can readily be put to rest.

All companies transacting business in the United States must comply with federal antitrust laws. Federal antitrust laws proscribe certain unlawful tying arrangements. The same tying arrangements fall within the purview of the antitrust laws of California and other states based on federal antitrust precedents. This Court unanimously has determined that state antitrust laws are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and

ensuring the compensation of victims of that conduct." *See California v. ARC America Corp.* 490 U.S. 93, 101-102 (1989). If any state were to enact antitrust legislation that "actually conflicts" with federal antitrust law, the legislation would be subject to federal preemption. *Id.* at 100-101.

Nothing in the record reviewed by the California Court of Appeal would suggest that AT&T or any other company is required by California's Competition statutes to do anything beyond complying with federal antitrust law. Each and all are able to sell their products and services and compete on equal terms throughout the Union, and that has remained the case, not despite, but rather because of state (and federal) antitrust enforcement of out-of-state anticompetitive conduct on behalf of its citizens over many, many years.

Anticompetitive conduct imposes a significant burden on commerce. Thus, the chief concerns of state antitrust law enforcement and the Commerce Clause are complementary: both protect against actions "with the aim and effect of establishing an economic barrier against competition . . . ," the former through the use of private anticompetitive conduct and the latter through the use of state authority. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

So, for reasons going beyond the palpable absence of jurisdiction under 28 U.S.C. § 1257(a), this antitrust case — which challenges the Petitioner's alleged anticompetitive conduct under state laws intended to protect and maintain the flow of commerce — is not certworthy. It is simply the wrong case at the wrong time for a further review and application of this Court's Commerce Clause principles, one that could have far reaching and uncharted consequences for the rapidly changing face of American business.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES A. STEARMAN
Counsel of Record
RICHARD S. PRICE, II
1235 N. Harbor Blvd.
Suite 200
Fullerton, CA 92832
(714) 871-1132

H. KENNETH KUDON
KUDON LAW FIRM
Two Old Creek Court
Potomac, MD 20854
(301) 279-5634

Counsel for Respondent